(24)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1165

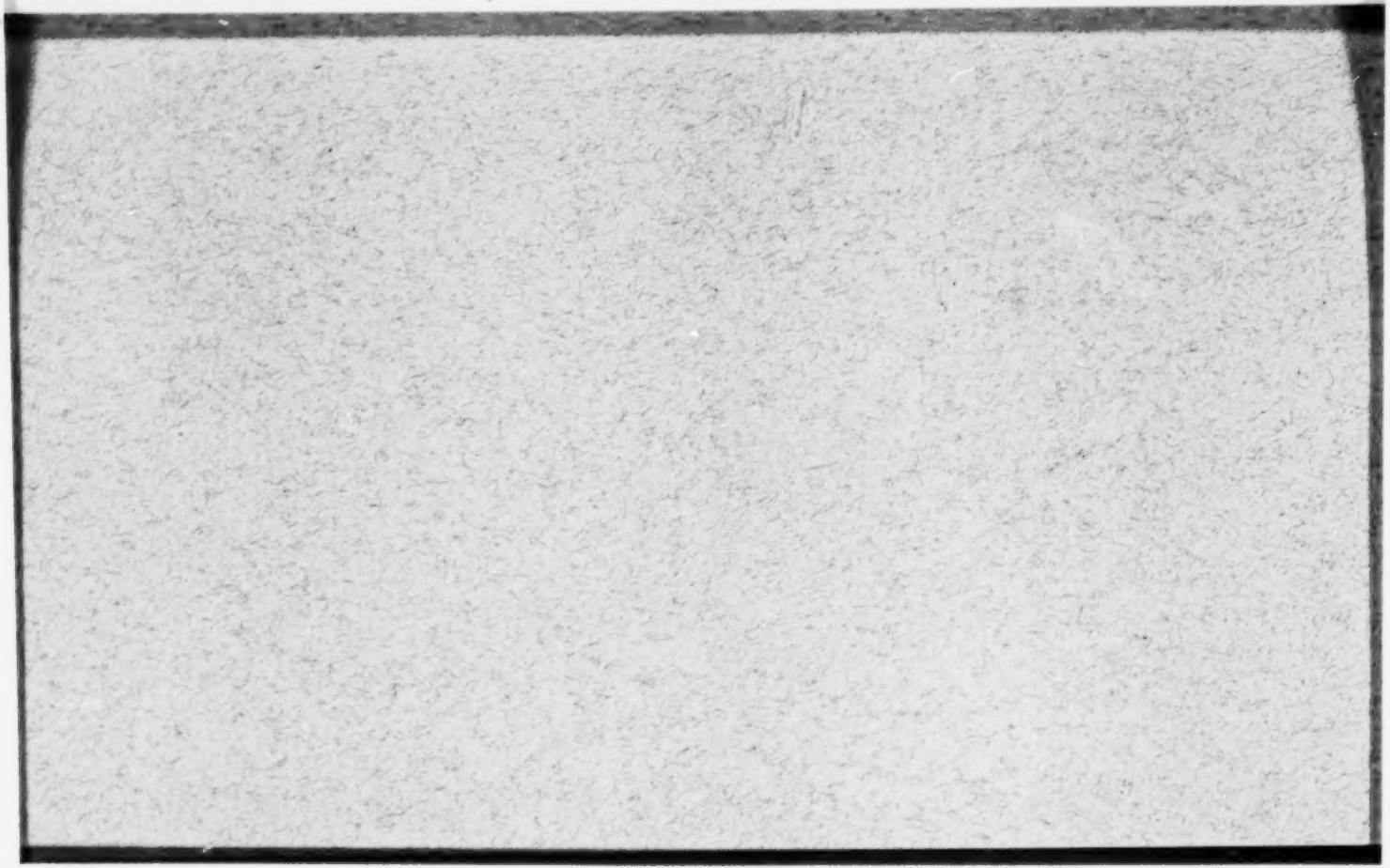
JOSEPH E. SHENKO AND RUTH A. SHENKO, ADMINISTRATORS OF THE ESTATE OF JOSEPH E. SHENKO, JR., A MINOR, DECEASED, *Petitioners*,

vs.

JACK COLE TRANSPORTATION CO.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

B. NATHANIEL RICHTER,
Counsel for Petitioners.



INDEX

Subject Index

Table of Cases Cited

Statutes Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1165

JOSEPH E. SHENKO AND RUTH A. SHENKO, ADMINISTRATORS OF THE ESTATE OF JOSEPH E. SHENKO, JR., A MINOR, DECEASED, *Petitioners,*

vs.

JACK COLE TRANSPORTATION CO.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Joseph E. Shenko, and Ruth A. Shenko, Administrators of the Estate of Joseph E. Shenko, Jr., Deceased, respectfully petition that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in this case on February 14th, 1945.

A

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 14th, 1945 (R. 136). The jurisdiction of this Court is involved under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347(a).

B

Statement of the Matter Involved

This case comes before this Court from the Third Circuit Court of Appeals 147 F. (2d) 133 (1945).

It involves a suit for damages instituted under the provisions of the Pennsylvania Survival of Action Statutes P. L. 2755 (1937), 20 P. S. 321, Note 772, and Act of 1855 P. L. 309, 12 P. S. 1602, as amended, and Pa. R. C. P. 2202, by the parents of Joseph E. Shenko, Jr., deceased, aged six years, as Administrators of his Estate, for his death, caused by being allegedly negligently run down by a truck and trailer of the defendant Jack Cole Transportation Co.

The jury returned a verdict for the defendant. The petitioners had contended that the child had walked into the public highway at the public crossing and while standing there in full view, was run down by a truck and trailer of the respondent which had come to the intersection and made a sharp left-hand turn into the wrong side of the street. In support of the petitioners' position, there was proof of the blood marks indisputably establishing the exact point of contact at the public crossing. In addition, the petitioners called several witnesses, who traced the child progressively along the sidewalk to the corner. Another witness related in complete detail how the child walked into the street at the crossing, turned and stopped,

and how the truck thereafter came to the corner, made a left turn and struck the child with the front bumper. In addition, the petitioners traced the course of the truck to the intersection, indicating haste and impatience on the part of the driver and the traffic confusion present at the corner, resulting in the wrongful turn made by the truck.

In its pleadings the respondent denied all knowledge of the accident. Pressed by the overwhelming weight of the record, at the close of the petitioners' case, in support of the petitioners' contention, the respondent shifted its defense from a complete denial of the occurrence of the accident, to an affirmative defense, that sought to establish that the child came to the corner *after* the truck started to make the turn and ran into the extreme left-rear of the truck, beyond the last wheel of the trailer.

The respondent could call no eye-witnesses to establish this defense. It merely called an Officer, who was permitted over the petitioners' repeated objections to express the opinion that certain marks at the extreme left-rear of the trailer were fingermarks made by a small child. There was absolutely no proof introduced then or later in the trial that these marks were:

(a) fingerprints at all, or

(b) made by the deceased, or

(c) made before the accident, at the time of the accident, or in the two hour interim between the accident and the time the Officer inspected the truck.

The respondent offered absolutely nothing but this testimony to support this, its sole defense offered in this case. Furthermore, upon the objection of the petitioners to the Officer's testimony, the Judge did not himself preliminarily decide its admissibility and relevancy, but passed that issue to the jury.

On appeal, the Circuit Court of Appeals implicitly conceded that this testimony was improperly admitted, but affirmed on the grounds that though the petitioners had objected to the Officer's testimony, the petitioners had failed to *move to strike out* the testimony in question and had not objected to the admission into evidence of the *photographs.*

The Circuit Court also ignored and failed to pass upon the complaint of the petitioners, that the trial Judge had not exercised his absolute judicial obligation and function of preliminarily, himself, ruling on the admissibility of evidence instead of passing that duty to the jury.

C.

Questions Presented

1. Whether under Rule 46, of the new Federal Rules of Civil Procedure, a party objecting to testimony is obliged to do more than make an objection. Is he also obliged to move to strike out testimony admitted over objection in order to protect his position as to its admissibility?

2. Whether under Rule 43 favoring admissibility of evidence, the rules of evidence governing relevancy may be gainsayed in Federal trial practice?

3. Whether under present Federal trial practice, a trial Judge is no longer obliged to pass preliminarily on the question of admissibility of evidence, before permitting the jury to consider its probative value?

4. Whether in the transition in the law towards speedy, efficient trials it is no longer prejudicial error to admit evidence having neither probative value nor preliminary relevance to the only issue raised by its proferror, especially where that party offers no other evidence in support of that fact?

D

Reasons Relied On for Allowance of Writ

The United States Circuit Court of Appeals for the Third Circuit has for the first time since the new Rules of Federal Procedure have been adopted, laid down the principle, that:

(*a*) It is not enough to object to testimony offered at trial, but that in addition, it is necessary to move to strike out such testimony after it is admitted over objection,

(*b*) The United States Circuit Court of Appeals for the Third Circuit, has inferentially (by failing to consider the point in its opinion), ruled that a trial Judge may pass the *judicial* function of passing preliminarily on the admissibility of testimony to the jury,

(*c*) The United States Circuit Court of Appeals has decided that it is not prejudicial error to admit totally irrelevant testimony to establish a party's main and sole contention, even though there is nothing else in the whole record otherwise supporting that contention,

(*d*) As the problems here raised, occur in every single trial in the United States Courts, it is of primordial importance that this Court define the necessary procedure to be followed in trial practice in protecting the record of a case and to establish a test for determining prejudicial error.

A supporting brief accompanies this petition.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Circuit Court for the Third Circuit, entered by that Court

in this case on February 14th, 1945, and that the said order be reversed by this Honorable Court, and that your petitioners may have such other and further relief as this Honorable Court may deem proper.

Respectfully Submitted,

B. NATHANIEL RICHTER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1165

JOSEPH E. SHENKO AND RUTH A. SHENKO, ADMINISTRATORS OF THE ESTATE OF JOSEPH E. SHENKO, JR., A MINOR, DECEASED, *Petitioners,*

vs.

JACK COLE TRANSPORTATION CO., *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals, Third Circuit, (R. 133) is reported in 147 F. (2d). The District Court of the United States for the Eastern District of Pennsylvania did not deliver a written opinion.

II

Jurisdiction

The jurisdiction of this case is invoked under Sec. 240(a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347(a). The judgment of the United States Circuit Court of Appeals, Third Circuit, to be reviewed was entered on February 14th, 1945 and is reported at 147 F. (2) 133.

III

Statement of the Case

A statement of the case appears under heading "B" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to with the request that it be considered as here incorporated, by reference.

IV

Questions Presented

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "C" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to with the request that they be considered as here incorporated by reference.

V

ARGUMENT

Summary of Argument

1. The evidence of marks on the side of the truck was improperly admitted, since no logical basis of its relevancy was established, connecting the deceased with the marks, or affording reasonable ground for the jury conclusion that the decedent ran into the rear of the turning truck.

2. There was no duty on petitioners to move to strike out testimony improperly admitted over objection specifically indicating ground of objection in compliance with Rule 46.

3. The error in admitting evidence of these marks without some proof connecting the decedent with them, was

prejudicial error, especially since there was no other evidence supporting this sole defense raised by respondent.

4. The trial Judge avoided his inescapable obligation of preliminarily deciding the relevancy of these marks and improperly shunted that judicial function to the jury.

I. The Evidence of the Marks Was Improperly Admitted

The petitioners presented the case on the theory that respondent's truck had run down a child in clear view on the highway, at the pedestrian crosswalk. To do so was clearly negligence under Pennsylvania law.

The petitioners further showed that the respondent's driver had:

(1) manifested impatience at being delayed by a city ash wagon,

(2) finally passed it, reached the intersection and was met by trolley approaching head-on, which turned left at the intersection, resulting in a blockage there, necessitating a sharp left turn by the truck to avoid impact with the trolley,

(3) that this emergency of the truck driver's own making explained why, if true, the driver never saw the child in the crosswalk, and

(4) that as the bloodmarks indisputably established the point of impact, the truck must have been on the wrong side of the street in violation of the Pennsylvania Motor Vehicle Code, Act of 1929, May 1, P. L. 905 S. Sec. 1011, as amended, 75 P. S. 546.

Although the respondent, in its answer had pleaded no knowledge of the accident at all, the state of the record at the close of the petitioners' case presented so overwhelming a probability of a verdict for the petitioners, that the re-

spondent shifted its defense from complete denial of the occurrence to asserting that the decedent ran from the sidewalk into the extreme left-rear of the trailer, *after* the truck began to make a left turn at the intersection.

The respondent had no eyewitnesses to uphold this contention. It called one TUCKER, who was a half-block away from the truck as it turned, and he testified only that he did not see the front of the truck strike the child. This was negative testimony. *He also said he did not see the child run into the side of the truck*, nor indeed did he see the child at any time until after the truck had left the scene of the accident.

The whole case turned then on whether the front of the truck struck the child or the child ran into the extreme left rear of the trailer.

The only evidence offered by respondent in support of its contention was that of Officer HOMMELL. Over petitioners' objection, he was permitted to testify that he found marks of a small child at the extreme left rear of the trailer four feet above the ground; the inference intended to be drawn was that they were those of the decedent. However, these marks were to the extreme rear of the truck *beyond* the last wheel of the forward moving vehicle. The coroner's finding however of crushed chest, pelvis and legs conclusively established that the decedent was run over by one or more wheels. *It would have been physically impossible for the child to* have been crushed by any one or more of the wheels and yet have also *later* made these marks on the side of the truck, beyond all the wheels, especially at that height on the truck.

There was absolutely no proof:

(a) that these were the finger prints of the decedent,

(b) that they were finger prints at all,

(c) that they were not on the truck before the accident,

(d) that they did not get on the truck in the two-hour interim between the accident and the time HOMMELL found them,

(e) or, that the decedent was ever seen in an upright position any place near the point on the trailer where the marks were found.

Nothing was offered to connect these marks with the decedent. No other evidence of this only issue in the case was offered.

The petitioners duly objected and stated their reason in full compliance with Rule 46. The petitioners repeated their objections.

The Circuit Court in an opinion without a single citation, sustained the jury verdict for the respondent and dismissed petitioners' argument that the trial Judge prejudicially erred in admitting these marks on the following grounds:

(a) The respondent had offered several photographs of the truck and trailer in evidence without objection; that since the petitioners did not object to the photographs, it was too late to object to the Officer testifying as to what he saw on the truck since the photographs contained these same marks. Actually the petitioners had no idea that the pictures contained such marks or that they were being offered to establish the marks in evidence. They are microscopically to be seen only if one's attention is directed to them. Petitioner failed to object to the photographs only because they were offered generally and without any reference to the virtually indiscernable marks in the photographs *later* stressed by respondent. Just as the respondent could not have objected to the petitioner's offer of pictures of the intersection to give a general view of the locus of the accident, so the petitioners could not object to a general pic-

ture of the respondent's truck, unless the respondent had specifically indicated the marks and expressed the intended purpose to which the pictures were to be later put.

(b) That the petitioners had permitted the witness to answer the following questions without objection:

> "Q. What kind of a truck was it?
> A. It was a International Tractor and a Freuhauf trailer.
> Q. Did you examine it?
> A. Yes I did.
> Q. Did you find any marks on it?
> A. The only marks I could observe was on the left rear end.
> Q. What were they?
> A. Well, they appeared to be finger marks, and also * * *."

At this point the Court below held that following objection as it appears upon the printed p[illegible](a) came too late:

> "Mr. Richter: That is objected to, if Your Honor please. No connection whatever between that testimony and this deceased."

Not until an objectionable question is asked can one object. If the Officer could say he found this child's glove there, or identified finger prints, or blood marks of this decedent on some part of the truck, it would have been perfectly proper to admit it. Captious objections only hurt the objector's case. Not until the petitioners did object was there legal cause to do so. Actually the witness was answering the question as petitioners' counsel was simultaneous raising his objection. The witness merely stopped talking where the record indicates and the stenographer noted what both said.

The Court below, however, held that the petitioners objected too late and that the door was then opened for the whole line of examination. It is submitted that this was error.

(c) Seemingly recognizing that the two above-mentioned alleged oversights as to timely objection by the petitioners were not adequate to sustain the admission of this highly improper evidence, the learned Court below then rested its major justification therefor on the ground that the petitioners had not moved to strike out this testimony. If it was too late to object could petitioners move now to strike?

For those who wish to protect a record where testimony has been admitted over objection, the lower Court has now superimposed an additional requirement. It is necessary apparently to move to strike such testimony after admission. By Rule 46 it was intended that exceptions, sealed bills of exceptions and all other technicalities heretofore required to protect the record from judicial error in rules of evidence be discarded. Efficiency and simplicity dictated the new rule providing that an objection was all that was necessary to reserve the question of law involved for Appellate consideration, as long as the objector indicated the ground for his objection revealing to the trial Judge thereby the legal basis for the objection.

If this decision stands, then in each of the hundreds of cases tried daily in the United States District Courts, *every* lawyer will have to move to strike after evidence is admitted over objection. And when to move, and how often?

Even in our former practice one needed to move to strike only when:

(a) a Court admitted evidence tentatively upon promise of its offeror to connect it up, and failed to do so,

(b) a witness spoke before the objection could be promptly made.

Neither situation meets the instant case.

A reading of the pertinent segment of the record must unhesitatingly indicate that any motion to strike, even if made, would have been summarily overruled by the trial Judge. His ruling and the comments that follow show the rationale thereof, and clearly indicate how the trial Court would thereto have reacted.

No previous decision of this Court as yet has considered Rule 46. No other Court has suggested that evidence admitted over objection may not be the subject of appeal because the objector failed to move to strike out the testimony. On its face, it creates a dangerous precedent. It is diametrically opposed to the spirit of the Rule eliminating technical objections and defenses. If the requirement now suggested is proper, the petitioners had no way to know of it and should not have been penalized by this ruling or decision.

(c) Finally, the Court below isolated the problem for inspection on the merits. The Court then apparently lost sight of the fact that *it was the defendant who was asserting this defense and had the burden of proof thereon,* and without stating any legal basis whatsoever therefor, concluded there was no error in admitting the contested evidence. The learned Court below, without citing authority to the contrary, or asserting its basis for appropriate relevancy of this testimony, held our cases inapposite. They were:

Hoover v. *Reichard,* 63 Pa. Sup. Ct. 517 (1916);
Caffery v. *P. & R. Ry. Co.,* 261 Pa. 251, 104 A. 569;
Buck v. *McKeesport,* 223 Pa. 211, 72 A. 514;
Rex v. *Wiswell I. D. L. R.* 624 (Nova Scotia 1935).

We consider them very much in point. The Court, however, begged the question when it said:

> "Whatsoever may be the claim of the defendant, the complainants cannot assert that the defendant's truck and trailer were not in the accident. If it bore no evidence of collision on its truck part *and did have such evidence* on the trailer, the effect of it would be a material contradiction of the testimony of Joseph Plizak, who had the Shenko boy struck by the front of the truck while he was standing in plain sight on the street, and would confirm the testimony of the witnesses for defendant who saw no boy in the street and asserted that the front of the truck had collided with no person." (Italics supplied.)

The very question raised in this appeal is whether there was any competent evidence to prove that there were such marks on the trailer of this impact. The Court below did not in its opinion set forth any explanation or legal basis to establish the propriety of admitting this testimony. *It assumed its propriety when that very question was the question in issue.* In conclusion the Court merely reiterated that the petitioners had not objected either to the photographs or in time as to the Officer's testimony.

This problem of Federal trial practice, so simple in nature as to render its error obvious, is nevertheless so serious and basic as to place the entire scope and utility of the Law of Evidence and the protection intended by it, in jeopardy. This was prejudicial error because the record is barren of any other evidence to support the solitary factual issue raised by the respondent to avoid liability for the death of this child. It is the only possible explanation for this most extraordinary verdict.

While Rule 43 favors the reception of evidence, and captious objections must be disregarded, no one may con-

tend that there can be orderly administration of justice and judgment rendered by due process of law without abiding by the fundamental rules of the law of evidence.

Relevancy, logic and reasonableness must still be the effective factors in determining the admissibility of testimony. Otherwise verdicts rendered would be capricious, prejudiced and unjust. The search for efficiency, speed and the discarding of technical defenses and procedure have not eliminated what we have said above. To do otherwise, is to allow juries to arrive at such capricious verdicts as they did in the instant case, basing it on evidence of the character here complained of; evidence having no basis in fact, logic, law or ethics to support the issue sought here to be established.

II. The Trial Judge Did Not Rule Preliminarily on the Relevancy of the Evidence, But Passed That Exclusive Judicial Function to the Jury.

Upon objection by the petitioners, and a statement as to the ground of the objection, on the admissibility of these alleged finger marks, the trial Judge said:

> "I think I will overrule the objection and allow him to say what he saw. Of course, his answer that he saw some finger marks, *unless the jury finds* from the evidence that those are the finger marks of the deceased boy, then that would be the only way that you could consider such evidence. If you believe that they are finger marks put there by somebody else beforehand, of course, that would be no evidence." Italics supplied.)

This learned Court is respectfully asked to rule whether the Rules of Evidence were vitiated by Rule 43.

In any offer of testimony, the primary function of considering whether it is of proper probative quality, from an adequate primary source and in form to be weighed by the

jury is solely and exclusively a judicial function. The Judge *alone* must with every offer of evidence, preliminarily determine its relevancy, the competency of the witness and the form of the evidence. Having overruled an objection in favor of admissibility of the evidence, he may then pass it to the jury for its decision on its *credibility* and *weight*. The Judge did not perform his preliminary function here.

The learned trial Judge in this case specifically announced that he was putting two things up to the jury to decide:

(a) *relevancy* of the testimony,

(b) its probative value and weight.

As to (a), he said:

> "Unless the jury finds from the evidence (what the policeman said he saw) that those are the fingermarks of the boy, then that would be the only way that you (jury) could consider such evidence."

There was neither previous nor subsequent testimony offered by respondent identifying these marks as to the time, size or character that properly created a reasonable basis for jury consideration of point (b). Yet the Judge said:

> "If you (jury) believe that they are finger marks put there by somebody else beforehand, of course, that would be no evidence."

How could the Judge allow a jury to conclude that these were the marks of the deceased in the total absence of evidence so pointing in the slightest degree?

Inferentially he necessarily said:

> "If you do believe they are the marks of the deceased then you can conclude that the truck did not strike the deceased."

The English common-law historically has made the Court the sole Judge of the admissibility of evidence. Lord Abinger in *Bartlett* v. *Smith*, 11 Meeson & Welsby, 483 at p. 485 (Eng. Rep.) 1845, said:

> "All questions respecting the admissibility of evidence are to be determined by the Judge, who ought to receive that evidence, and decide upon it, without any reference to the jury. In all cases where an objection is made to the competency of witnesses, any evidence to show their incompetency must be received by the Judge and adjudicated on by him alone."

See also *Gorton* v. *Hadsell*, 9 Cush. 508, 511 (Mass. 1852); McKelvey on Evidence (3rd Edition) p. 66. It is submitted that to permit the Court to shift the question of relevancy or incompetency of evidence to a jury is to rob the adverse party of the very protection for which rules of evidence are designed.

The American Law Institute's Model Code of Evidence (1942 Rule 11) states that when the admissibility of evidence is in issue the question is for the Judge. The comment to this section (p. 65) says:

> "This Rule assumes the normal common law practice which requires the Judge to try and to determine disputes as to the existence of facts which are prerequisite * * * the admissibility of *relevant* evidence. * * * *the jury has nothing to do with the decision. That is for the Judge alone.*" Italics supplied.)

Wigmore says unequivocally:

> "That the Judge is to pass on the preliminary conditions necessary to the admissibility on evidence is unquestioned." (Wigmore's Treatise on Evidence—Third Edition, 1940 §1451 and 2550.)

See also Wigmore on Evidence (Student Text Sec. 464).

In only one situation have any Courts permitted juries to participate in a question of admissibility of evidence.

In the case of confessions offered in evidence and objected to as having been made involuntarily, some Courts, though decidedly not all, hold that *after* the Court has passed preliminarily upon the issue of voluntariness the jury may review this same issue in determining what weight to lend to the facts stated therein. Even in such States, however, the question whether there was any inducement held out or any pressure exerted calculated to make the confession untrue, *must be determined in the first instance by the Court.* See Henry Pennsylvania Trial Evidence (3rd Edition 1940) p. 124; and Pa. cases cited in Footnote 18 in accord. Compare *Ashcraft* v. *Tennessee*, 64 S. Ct. 921 (1944 U. S.), especially Footnote 2, p. 922, where this Court was critical of the Tennessee Court for admitting a confession in evidence in a criminal case without first affirmatively holding, as ostensibly required by earlier Tennessee cases, that the confessions were voluntary. Even this restricted practice of permitting the jury to participate with the Judge in the consideration of the voluntariness of the confession has been subjected to strong criticism. Thus, Wigmore's (Treatise on evidence, Supra, Sec. 861, p. 347), refers to this practice in some States as an "unpractical heresy."

In short, the great weight of authority has recognized the wisdom of making Courts rather than juries the guardians of admissibility. It is respectfully submitted, therefore, that the Trial Court erred in permitting the jury to consider the evidence of alleged finger marks, notwithstanding its instruction that the jury disregard the marks unless found to be those of deceased.

Accordingly, we submit, that the trial Judge did not perform his necessary preliminary judicial function of ruling on the relevancy and therefore the admissibility of the evidence, and that he erred when he asked the jury to do that in his stead.

Summary

1. There was no legal or equitable basis upon which the evidence of the marks could properly have been admitted.

2. Rule 46 requires only that an objection be taken in order to preserve the legal question involved for Appellate review. The opinion below requires that the objector move to strike such evidence admitted after objection. This requirement has no statutory authority and no Rule of Federal Civil Procedure justifies it.

3. The admission of these marks into evidence in this case was prejudicial error because it was the sole evidence on the only issue raised as a defense by the respondent.

4. The learned trial Judge failed preliminarily himself to rule on the relevancy and therefore the admissibility of the evidence in question, and passed that exclusively judicial function to the jury, thereby depriving the petitioners of a trial by judicial process.

Respectfully submitted,

B. Nathaniel Richter,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 1165.

JOSEPH E. SHENKO and RUTH A. SHENKO, Administrators of the Estate of Joseph E. Shenko, Jr., a Minor, Deceased,

Petitioners,

vs.

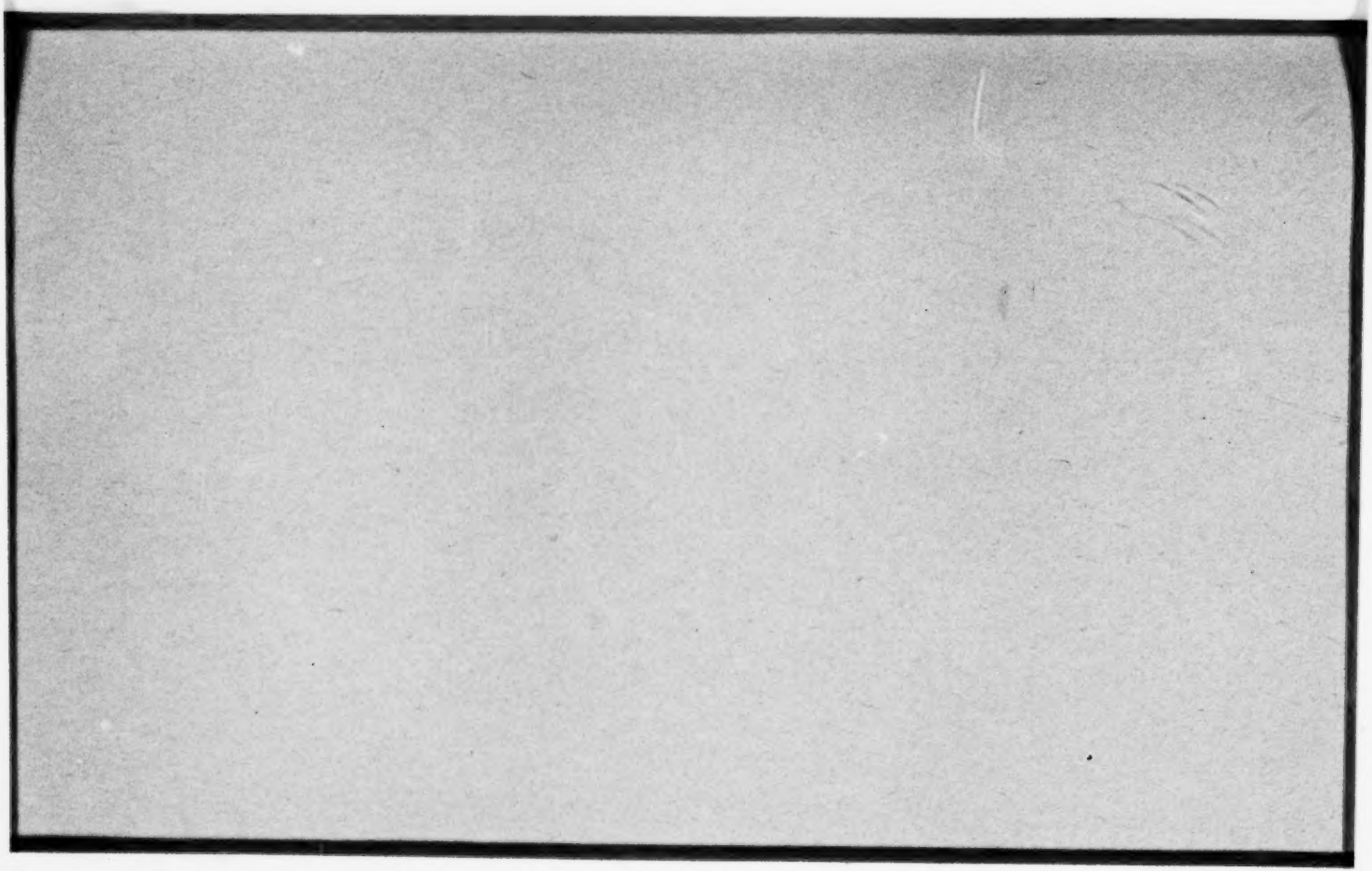
JACK COLE TRANSPORTATION CO.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY S. AMBLER,
FRANK R. AMBLER,
1025-26 Phila. Saving Fund Bldg.,
Philadelphia 7, Pa.,
Attorneys for Respondent.

Martin & Lyle, 302 Penfield Bldg., Phila., Pa.



INDEX

TABLE OF CASES CITED

COUNTER-STATEMENT OF THE FACTS.

This was an action in trespass brought by plaintiffs, to recover damages for the death of their six year old son, who, plaintiffs contend was struck and killed by defendant's truck due to its negligent operation by defendant's servant.

At the trial, except for the testimony of one witness, John Plizak, hereinafter referred to, the evidence produced on behalf of the plaintiffs was largely circumstantial. The alleged accident occurred on the northeast corner of Newmarket Street and Fairmount Ave., Philadelphia, Pa. Defendant's truck proceeded south on Newmarket Street, made a left hand turn, proceeding east on Fairmount Ave. Immediately after the truck passed the intersection, the body of the decedent was discovered lying in the cartway and undoubtedly run over by some vehicle.

John Plizak, a seven year old boy, testified on behalf of the plaintiffs that he was talking to the decedent just before the accident; that he actually saw the decedent go into the cartway and that he saw the left front of the defendant's truck strike and knock him down (20a).

On cross-examination, he said that he could not see what happened after the truck got between him and the decedent (33a) and that he could not see the truck hit the decedent (34a).

Upon re-direct examination, he reiterated that he did see the truck strike the decedent (34a).

It also appeared that the plaintiffs did not give the name of John Plizak as an alleged eye witness to the occurrence to the police who were investigating the accident (81a), and that the said witness was not present either before the coroner or in the manslaughter trial of the driver (87a).

Defendant's driver testified that he saw no child in the street and the front of his truck did not strike the decedent and that he never saw the decedent until after his body was found lying in the street (70a).

The theory of the defense is that the decedent walked or ran into the left rear side of the defendant's truck after the front had passed him. In support of its theory, the defendant had its driver, Veneley Hyde, identify two photographs of the defendant's truck. One of them defendant's exhibit No. 2, a copy of which appears at 125a, shows the front of the truck and no traces of an accident are visible thereon. The other, defendant's exhibit No. 1, a copy of which appears at 124a, shows the left side of the defendant's truck and certain markings appear thereon on the rear left hand side of the vehicle, which defendant contends were traces of this accident. Both of these photographs were offered and received in evidence without any objection on the part of the plaintiff (67a, 68a).

Subsequently, defendant placed on the witness stand, George Hommel, a police officer of the City of Philadelphia. He testified that he saw the truck when he arrived at the police station about 5 P. M. (The accident occurred around 3 P. M. of the same day.) Without any objection interposed by the plaintiff, he was permitted to testify that he observed no marks on the vehicle except on the left rear side of the truck (81a).

He was then asked to describe the marks which he saw and he said that they appeared to be finger marks, when counsel for plaintiffs for the first time interrupted and objected to the testimony on the ground that there was "no connection between that testimony and the deceased" (81a).

In overruling this objection the trial judge said (82a) "I will allow him to say what he saw. Of course, his answer that he saw finger marks, unless the jury finds from the evidence that those are finger marks of the deceased boy, then that would be the only way that you could consider such evidence. If you believe that they are finger marks put there by somebody else beforehand, of course, that would be no evidence. . . . We will let the witness say just what he observed, and then it is a matter of argument between counsel as to whether or not it was the finger marks of this boy."

The witness was then shown the photographs of defendant's truck, the aforementioned defendant's exhibits No. 2 and No. 1 and he identified them as photographs of the vehicle involved in the accident and also said that the marks which appeared on the rear of the trailer were the marks which he observed at the time he inspected the truck (82a).

The witness then testified that the finger prints were very small in size, and not as large as a man's hand (83a). He also testified that there were "brush marks" on the vehicle at the rear left side of the body where something had rubbed against the vehicle at this spot (83a).

On cross-examination, the witness admitted that he did not know whether any of these marks were on the vehicle before the accident (84a) and also that the marks were located past the last wheel of the entire vehicle (84a).

ARGUMENT.

The questions presented by the petitioners do not meet the issues raised at trial, or in the Circuit Court of Appeals for the Third Circuit. The issue was as to the admissibility of the testimony of the police officer respecting the finger marks on the left rear of the trailer, and not the trial judge's instructions to the jury on the weight and credibility of such evidence.

Counsel for the petitioners thus confuses the requirements of evidence as scientific proof of the existence of a fact and the rules relating to the relevancy of evidence and the permissive inferences which may be drawn therefrom.

Professor Wigmore in his treatise on Evidence, Vol. I, sec. 31, p. 418, well states the distinction as follows:

"The peculiar danger of inductive proof is, that there may be other explanations than the desired one for the fact taken as a basis of proof. In the study of logic, we are concerned with discovering the defects of a mode of proof, while in

judicial rulings upon evidence, we are concerned merely with the propriety of admitting the fact at all—with its quality as a possible inference, not as absolute proof."

In considering what permissive inferences may be drawn from established facts, Professor Wigmore in section 32 of the aforesaid treatise states the rule as follows:

"The failure to include a single other rational hypothesis would be from the standpoint of proof, a fatal defect; and yet, if only that single other hypothesis were open, there still might be an extremely high degree of probability for the conclusion first claimed. When Robinson Crusoe saw the human footprint on the sand, he could not argue inductively that the presence of another human being was absolutely proved. There was at least, for example, the hypothesis of his somnambulism. Nevertheless the fact of the footprint was for his conclusion evidence of an extraordinary degree of probability, i. e., it passed beyond the line of mere admissibility. The requirement or test then for this lower standard—admissibility—would be something like this: Does the evidentiary fact point to the desired conclusion not as the only rational hypothesis, but, as the hypothesis or explanation more plausible or more natural out of the various ones conceivable? Or to state the requirement more weakly, is the desired conclusion not the most natural but a natural or plausible one among the various conceivable ones?"

The ruling of the Supreme Court of Pennsylvania, in *Johnson v. Philadelphia and Reading Rway Co.*, 283 Pa. 480 (1925) is clearly distinguishable from the instant case. In that case, it was held that the presence of plaintiff's automobile on the sidewalk could not be inferred from the testimony of a witness who reached the scene of the accident an hour after its occurrence that he observed tire marks on the sidewalk where there was nothing to show "that the marks were not there before the accident or that they were not made by some other car after the accident." The court pointed out "As this was a public street, and there was

nothing to connect the marks with the car in question, the conclusion sought to be drawn was a mere guess and the offer was properly excluded."

In the instant case, the surrounding circumstances do connect the defendant's truck with the decedent. The very basis of the plaintiff's claim is that it was this particular truck which struck this particular decedent. Certainly, in the light of all the surrounding circumstances, it cannot be said that an inference that the finger prints and brush marks on the defendant's truck were traces of this accident, was a mere guess and not a matter of logical deduction from the evidence. In this connection, it should be noted that the Supreme Court of Pennsylvania in Johnson v. Philadelphia and Reading Rway Co., supra, made another ruling on evidence involved in that case, which indicates that that tribunal was not of the opinion that evidences of traces of an accident of the type with which we are here concerned, required further direct proof to render it relevant. The court in that case, at page 484, said: "Marks were found on the tender back of the engine from which it is urged for defendant that the car ran into the train at that point, but as the collision turned the car around and as one of the defendant's trainmen testified he heard a scraping noise alongside the train, it is quite possible the marks on the tender did not result from the first contact."

We submit that it is noteworthy that the Supreme Court did not hold that the testimony as to the traces of the collision which existed on the defendant's engine were irrelevant in the absence of direct affirmative proof that they were actually caused by the litigated collision. The admissibility and relevancy of such evidence was conceded and all that the court held was, that such evidence was not *conclusive* of the fact that that was the actual point of contact, in view of the testimony of the scraping noise alongside the train.

Gibson, J., in speaking for the United States Circuit Court of Appeals, for the Third Circuit, in an opinion filed on

February 14, 1945, reported in 147 Fed. (2d), clearly met the issue as follows:

> "The attention of the court has been called to several cases in which tire or skid marks have been ruled out in cases of automobile accidents when not the subject of testimony until a considerable time after the accident. The courts so excluding such testimony have considered the number of motor vehicles on the road and the great probability that another car than that to which the mark was attributed had caused it. Those cases are not parallel with the instant case. Whatsoever may be the claim of the defendant, the complainants cannot assert that the defendant's truck and trailer were not in the accident. If it bore no evidence of collision on its truck part and did have such evidence on the trailer, the effect of it would be a material contradiction of the testimony of Joseph Plizak, who had the Shenko boy struck by the front of the truck while he was standing in plain sight on the street, and would confirm the testimony of the witnesses for defendant who saw no boy in the street and asserted that the front of the truck had collided with no person.
>
> "In admitting the testimony of the police officer, particularly in view of the testimony which preceded the testimony as to brush marks and finger marks, we feel that the court was not in error. It will be recalled that a photograph had been offered in evidence without any objection."

Wherefore, respondent respectfully submits that the petition for writ of certiorari should be dismissed.

Respectfully submitted,

HENRY S. AMBLER,
FRANK R. AMBLER,
Attorneys for Respondent.

End